STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2008
v MURRAY KEITH WARREN, Defendant-Appellant.	No. 276090 Wayne Circuit Court LC No. 06-008908-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MARCUS ANDREW STRONG, Defendant-Appellant.	No. 276425 Wayne Circuit Court LC No. 06-009249-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DAVID JOVON DUNBAR, Defendant-Appellant.	No. 276685 Wayne Circuit Court LC No. 06-011503-01

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Defendants Murray Keith Warren, Marcus Andrew Strong, and David Jovon Dunbar were convicted of voluntary manslaughter, MCL 750.321. Defendants Strong and Dunbar were also convicted of witness intimidation, MCL 750.122(7)(c). Defendant Warren was sentenced as

a third habitual offender, MCL 769.11, to 85 months to 30 years' imprisonment for his manslaughter conviction. Defendant Strong was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 200 months to 40 years for each of his convictions. Defendant Dunbar was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 84 months to 22-1/2 years for each of his convictions. All three defendants appeal as of right. We affirm defendants' convictions, but vacate defendants' sentences and remand for resentencing.

I. Basic Facts and Proceedings

In July 2003, Darrell Zion was driving a pickup truck on a residential street in Detroit, and he veered to avoid a group of people who were playing basketball. The truck hit some sand and struck a pole, and Zion and the victim emerged from the truck. A group of men approached them. Zion ran away, and the victim was beaten and kicked to death. Constance Holland, who lived in the neighborhood and witnessed the incident, knew defendants and identified them as the perpetrators. Zion, who was hiding nearby and witnessed the incident, identified defendants Strong and Warren.

Less than two weeks after the incident, defendant Strong approached Holland outside a local store and punched her twice in the face, threatening to burn down her mother's house if she testified against him. Defendant Dunbar also told Holland that he would find out where her mother lived if she "told on him," and she construed this as a threat. Holland moved away from the neighborhood because she was afraid, and she avoided the police until 2006, when she was arrested as a material witness.

All three defendants were charged with first-degree premeditated murder, MCL 750.316(1)(a), and tried jointly before a single jury. All three defendants were convicted of the lesser offense of voluntary manslaughter, MCL 750.321. Defendants Strong and Dunbar were also convicted of witness intimidation, MCL 750.122(7)(c).

II. Habitual Offender Sentencing

All three defendants argue that the trial court improperly sentenced them because it incorrectly determined their statuses as habitual offenders. We agree. The interpretation of these statutes is a question of law we review de novo. *People v Hornsby*, 251 Mich App 462, 469; 650 NW2d 700 (2002). However, we review for an abuse of discretion a trial court's decision regarding whether to enhance a defendant's sentence pursuant to the habitual offender statutes. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). An abuse of discretion occurs when the sentencing court chooses an outcome that falls outside the permissible principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Although the instant offense was committed in July 2003, defendants were not convicted until 2007. In the interim, defendants were convicted of various felonies arising from unrelated offenses. Defendant Dunbar was sentenced as a second habitual offender pursuant to MCL 769.10 based on a 2004 felony conviction. Defendant Warren was sentenced as a third habitual

offender pursuant to MCL 769.11 based on felony convictions that occurred in 2005 and 2006. Defendant Strong was sentenced as a fourth habitual offender pursuant to MCL 769.12 based, in part, on a 2005 felony conviction.[1] Defendants claim that the trial court improperly relied on these convictions because they did not precede the commission of the sentencing offense for purposes of sentence enhancement.

MCL 769.10, MCL 769.11, and MCL 769.12 authorize sentencing enhancement where one has been convicted of a felony, "and that person commits a *subsequent* felony within this state[.]" (Emphasis added.) As this Court has previously held, under the plain language of the habitual offender statutes, a prior conviction must precede the commission of the supplemented offense in order for that conviction to be used for enhancement; it is not sufficient that the offenses were merely committed at different times. *People v Sanders*, 91 Mich App 737, 744; 283 NW2d 841 (1979), applying *People v Covington*, 70 Mich App 188, 193-194; 245 NW2d 558 (1976), and *People v Johnson*, 86 Mich App 77, 79-80; 272 NW2d 200 (1978); *People v Smith*, 90 Mich App 572, 574; 282 NW2d 399 (1979), rev'd on other grounds 407 Mich 906 (1979).[2]

The trial court relied on *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990), and *People v Stoudemire*, 429 Mich 262; 414 NW2d 693 (1987), mod *Preuss*, *supra* at 737, 739, in concluding that the habitual offender statutes permit consideration of convictions occurring after the date of the supplemented offense. This reliance is misplaced because those decisions do not address that issue; rather, they address the sequence of prior felony convictions and sentences. Indeed, in *Preuss*, *supra* at 717, 721, 739, the Court held that there is no requirement that a fourth habitual offender's "three prior offenses, convictions, or sentences occur in any particular sequence."

The prosecution concedes, and we agree, that the trial court's reliance on convictions occurring after the date the sentencing offenses were committed, as a basis for enhancing the sentences imposed, is contrary to the plain language of the habitual offender statutes. The minimum sentences imposed exceed the unenhanced guidelines ranges. Thus, defendants' sentences are invalid and require resentencing. *People v Mutchie*, 251 Mich App 273, 274-275; 650 NW2d 733 (2002). Accordingly, we vacate defendants' sentences and remand for resentencing.[3]

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[1] Defendant Strong does not dispute that he has two prior felony convictions that preceded the commission of the instant offense.

[2] Although the habitual offender statutes have been amended since these cases were decided, the changes do not implicate this Court's previous interpretations, and these holdings are equally applicable to the current versions.

[3] We decline the prosecution's request to hold defendant Strong's case in abeyance pending a decision of our Supreme Court in *People v Gardner*, 477 Mich 1096; 729 NW2d 519 (2007). We acknowledge that the Supreme Court's decision in *Gardner* could have implications regarding how many of defendant Strong's felony convictions preceding the commission of the instant offense may be considered for enhancement under the habitual offender statutes. However, that decision will not affect the issue presented in this case, i.e., whether defendant

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Although the prosecution asserts that either consecutive sentencing or a departure from the sentencing guidelines range is appropriate, that is an issue for the trial court to consider at resentencing.

III. Defendant Warren's Remaining Issue in Docket No. 276090

Defendant Warren argues that the trial court improperly denied his request for a missing witness instruction based on CJI2d 5.12, with respect to the prosecution's failure to produce Tiffany Spivey as a witness at trial. "This Court reviews a trial court's denial of a request for a 'missing witness' instruction for an abuse of discretion." *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000).

Assuming that Spivey was a res gestae witness, MCL 767.40a no longer requires the prosecution to produce all res gestae witnesses for trial. Rather, the prosecution only has "'an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request.'" *People v Perez*, 469 Mich 415, 418-419; 670 NW2d 655 (2003), quoting *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). When a prosecutor endorses a witness under MCL 767.40a(3), he "is obliged to exercise due diligence to produce that witness at trial." *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). However, the prosecution may add or delete from its list of witnesses at any time upon leave of the court and for good cause shown or by stipulation of the parties. MCL 767.40a(4); *Eccles*, *supra* at 388. The inability to produce an endorsed witness, despite the exercise of due diligence, "constitutes good cause to strike the witness from the list." *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). A missing witness instruction may be appropriate when the prosecution fails to secure the presence of an endorsed witness without a proper excuse. *Perez*, *supra* at 420.

Because the prosecution in the instant case endorsed either Spivey or Joseph Williams as a witness and did not indicate that both witnesses would be produced, defendant Warren should not have assumed that Spivey would be produced. The trial court determined that a missing witness instruction was not required because Spivey could not be located despite the issuance of a witness detainer. Defendant Warren argues, however, that the trial court erred by not conducting a due diligence hearing to determine what efforts were made to locate her. In *People v Cook*, 266 Mich App 290, 295-296 and n 7; 702 NW2d 613 (2005), this Court held that an evidentiary hearing is generally no longer required by MCL 767.40a with regard to the prosecution's obligation to produce witnesses, but it noted that there may be situations where a hearing is appropriate. In this case, however, defendant Warren never requested an evidentiary hearing. The trial court indicated on the record that it believed that the prosecution had exercised due diligence. If defendant Warren disagreed with the court's statement, he should have requested a due diligence hearing.

In any event, any error in the trial court's failure to provide the missing witness instruction in the absence of a due diligence hearing was harmless. As explained in *People v*

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Strong's 2005 felony conviction may be used to enhance his sentences in this case. If *Gardner* is decided before defendant Strong is resentenced, the trial court may address the effect of that decision at that time.

Schaefer, 473 Mich 418, 441-442; 703 NW2d 774 (2005), mod on other grounds *People v Derror*, 475 Mich 316, 320, 334, 342; 715 NW2d 822 (2006), instructional error does not require us to set aside a criminal conviction unless a miscarriage of justice resulted. See also MCL 769.26. A preserved nonconstitutional error is presumed harmless unless the defendant can demonstrate that it is outcome determinative, i.e., that it "undermined the reliability of the verdict." *Schaefer*, *supra* at 442-443 (internal quotation marks and citation omitted). Holland and Zion both implicated defendant Warren in the beating. The missing witness instruction would have permitted the jury to infer that Spivey's testimony would have been unfavorable to the prosecution's case. Officer Jared Lanzon testified that Spivey stated that an unknown man had come up and struck the victim. Therefore, the jury was already aware, without the instruction, that Spivey had given a different version of events that was unfavorable to the prosecution's case. It is not more probable than not that the failure to give the missing witness instruction affected the outcome of this case. Therefore, any error was harmless.

Defendant Warren's constitutional arguments related to his right to present a defense lack merit. In *People v Wilkens*, 267 Mich App 728, 744-745; 705 NW2d 728 (2005), and *People v Lee*, 212 Mich App 228, 257-258; 537 NW2d 233 (1995), this Court held that the prosecution does not have a constitutional obligation to call any witness "whom the defendant believes may support his defense in some way." Accordingly, there was no constitutional error.

IV. Defendant Strong's Remaining Issues in Docket No. 276425

A. Ineffective Assistance of Counsel

Defendant Strong argues that trial counsel was ineffective for not moving to sever his murder and witness intimidation charges for trial. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004), quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because no *Ginther*[4] hearing has been conducted, our review is limited to mistakes apparent on the record. *Mack*, *supra* at 125.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorer*, *supra* at 75-76. "[T]he defendant must overcome the presumption that the challenged action might be considered sound trial strategy." *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

[4] *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

MCR 6.120(C) provides that a trial court must sever charges that are not related as defined in subrule (B)(1). Offenses are related if they are based on the same conduct, a series of connected acts, or a series of acts that are part of a single scheme or plan. MCR 6.120(B)(1); *People v Abraham*, 256 Mich App 265, 271-272; 662 NW2d 836 (2003). The witness intimidation charge was based on defendant Strong's conduct in confronting and threatening Holland, a witness to the offense underlying the murder charge, less than two weeks after that offense. Although the two offenses occurred on separate dates, the witness intimidation offense was committed in an attempt to conceal the identity of the assailants who beat and kicked the victim to death. The two offenses were based on a series of acts that were part of a single scheme and therefore related. See *People v Tobey*, 401 Mich 141, 151-152 and n 15; 257 NW2d 537 (1977).[5] Because the offenses were related, severance was not required under MCR 6.120(C), and any motion to sever the charges would have been futile. Counsel is not ineffective for failing to file a futile motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant Strong also contends, in his supplemental brief filed in propria persona, that trial counsel was ineffective for not presenting an alibi defense and for improperly advising defendant not to testify. We disagree.

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). A substantial defense is defined as one that might have made a difference in the trial's outcome, and a substantial alibi defense is "one in which defendant's proposed alibi witnesses verified his version." *Id.* at 526-527. However "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*, *supra* at 368. A defendant must overcome the strong presumption that his attorney exercised sound trial strategy. *Id*.

Defendant Strong fails to identify an alibi defense or any evidence to support such a defense, and nothing in the record supports his claim that defense counsel failed to investigate an alibi defense. Therefore, he cannot overcome the presumption that counsel was effective. *LeBlanc*, *supra* at 578.

Defendant Strong also argues that counsel was ineffective in advising him not to testify. At trial, however, defendant Strong acknowledged on the record that he understood that he had an absolute right to testify, that the decision was his, and that he had decided not to testify. Where a defendant opts not to testify or acquiesces in counsel's decision not to testify, we deem the right to testify waived. *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985). Further, defendant Strong has not offered any evidence indicating that counsel's advice was improper. Although defendant Strong requests a remand for an evidentiary hearing on this claim, he has not made a proper offer of proof or explained what evidence or testimony he would

[5] MCR 6.120(B) is a codification of *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977). *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003).

produce in support of his claim. Therefore, an evidentiary hearing is not warranted. *Id.* at 685-686.

B. Scoring of Offense Variable 1

Defendant Strong contends that the trial court erred in scoring ten points for offense variable (OV) 1 of the sentencing guidelines. We disagree. When scoring the sentencing guidelines, a court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*

Ten points may be scored for OV 1 if "[t]he victim was touched by any other type of weapon." MCL 777.31(1)(d). In the instant case, the assistant medical examiner testified that the victim's injury patterns indicated that he had been beaten with an object with a grip imprint, such as a Mag® flashlight, and the injuries were not caused by the collision. Although an actual weapon was never recovered, the medical examiner's testimony supports the trial court's determination that the victim was touched by an object that was used as a weapon, and was sufficient to support a score of ten points for OV 1. See *People v Lange*, 251 Mich App 247, 254-258; 650 NW2d 691 (2002). Therefore, the trial court's scoring of OV 1 was proper.

We affirm defendants' convictions, but we vacate defendants' sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly